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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REFUGIO ESCALANTE, Defendant and Appellant.	E062449 (Super.Ct.No. SWF014933) OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton, Judge. Affirmed.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Anthony DaSilva, and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

At trial, the prosecution presented evidence defendant Refugio Escalante repeatedly molested his stepdaughter over a period of five years. The jury convicted him of aggravated sexual assault of a child by sexual penetration (Pen. Code, § 269, subd. (a)(5)), aggravated sexual assault of a child by rape (§ 269, subd. (a)(1)),[1] and four counts of forcible lewd acts upon a child (§ 288, subd. (b)), and the trial court sentenced him to 32 years plus 30 years to life.

On appeal, Escalante argues the trial court violated his Sixth Amendment right to compulsory process by denying his motion to allow his relatives who live in Mexico to testify at his trial by live video. We affirm.

I

FACTUAL BACKGROUND

Jane Doe was 22 years old when she testified about the abuse she suffered from the ages of eight to 13 at the hands of her stepfather. Although the abuse ended in 2005, the trial did not take place until 2014 because Escalante fled to Mexico the day Doe reported the abuse and law enforcement did not apprehend him until May 2013.

A. *Prosecution Evidence*

1. *Sexual abuse of Jane Doe*

Doe testified Escalante sexually molested her from 2000 to 2005. The abuse started when she was about seven years old and Escalante touched her breasts "under [her] shirt." When Doe was about eight or nine years old, Escalante began putting his

[1] Unlabeled statutory citations refer to the Penal Code.

fingers inside her vagina. When she was 10 years old, he started rubbing his penis against her vagina at night in his room when Doe's mother, C., was at work.

Doe was about 11 years old the first time Escalante forced her to have sexual intercourse with him. He took her into the bathroom attached to his room, placed a towel on the floor, took off her clothes, and put his penis inside her vagina. After that first time, he would rape Doe at least every other weekend, but sometimes as often as twice a week. He would rape her in his bedroom when C. was working, after the rest of the family had gone to bed.

Doe testified from 2000 to 2005 Escalante would molest her in the family home "[w]henever there was nobody around, whenever my mom went to work, whenever he got a chance to." She recalled him molesting her when C. ran errands with her siblings, when her siblings were outside playing and he told her to stay inside with him because of her asthma, when C. was working the night shift and everyone else had gone to sleep, and even sometimes when they were watching TV with her siblings and he had placed a blanket over himself and Doe.

Doe testified at length about the living arrangements during the period of abuse. In 2000 when the abuse began, her family lived in a three-bedroom trailer in Wildomar. The occupants of the house were Escalante, C., Doe, her younger sister and her older brother, and her half siblings (Escalante's two sons with C.). Various other family members frequently visited the house, including some of Escalante's cousins and his father. Around 2002, Doe's family moved into a larger, four-bedroom trailer in

Romoland. Escalante's brother, Jamie, moved in with them, along with his wife, Graciela, and their children Yamaly and Jamie, Jr. Doe recalled many of Escalante's relatives staying at that house as well, including his father and his nephew, Rodolfo. In Romoland, Doe shared a room with her younger sister, however, Escalante frequently made Doe sleep on the floor in his room under the pretense he could help her if she had an asthma attack. Jamie's family slept in a room at the opposite end of the trailer from Escalante's room.

Doe initially did not disclose the abuse because she was confused and scared of Escalante, who threatened to kill her mother and hurt her family if she ever told anyone. As she got older and recognized her stepfather's actions as sexual abuse, she could not bring herself to report him because she feared the impact it would have on her mother and siblings. She testified, "I didn't want to hurt my mom . . . how do you tell them that the person they love and look at as a father that he's doing this?" She started cutting herself when she was 13, partly to feel a pain she could control but mostly because she "just wanted somebody to notice that things weren't right."

Doe finally disclosed the abuse to her school counselor on November 7, 2005. The counselor testified it was difficult to get information from Doe because she seemed terrified and more concerned for her family than herself. She recalled Doe saying, "'If I tell you, it will hurt my brothers. It wouldn't be good for my brothers. It wouldn't be good for my mom.'"

Riverside County Deputy Sheriff Anthony Hamilton testified Doe was quiet and reserved when he interviewed her at school on November 7, 2005. At some point during the interview, Deputy Hamilton learned Escalante had arrived at the school. He stepped outside to speak with Escalante and advised him his family was under investigation for "things that were going on inside the home." About 30 minutes later, after Deputy Hamilton had finished interviewing Doe, he went to Doe's residence and saw Escalante driving away.

That ended up being the last day Doe and her family saw Escalante before his trial. C. testified Escalante called her cell phone a few times in the months following Doe's disclosure and threatened to find her and kill her in front of Doe. Nearly eight years later, in May 2013, law enforcement apprehended him crossing the United States/Mexico border into Brownsville, Texas.

Doe testified she had to "restart [her] life" after disclosing the abuse. She tried attending counseling but stopped after a few sessions because she found the abuse too difficult to discuss. She began overusing her anxiety and depression medication and other drugs. Her relationships with her siblings had changed, she felt embarrassed around her mother, and was scared because Escalante's whereabouts were unknown. She testified, "I did not want to be out here in California. . . . [H]e was not behind—you know, he was not in jail, so I was scared for a while. And I used to get . . . nervous out here, so what I chose was to just live in Illinois and start over. So that's what I did."

B. *Defense Evidence*

1. *Testimony of Escalante's niece, Yamaly*

Jamie and Graciela's daughter Yamaly testified in Escalante's defense. Yamaly is one year younger than Doe, and currently lives in Mexico, but from 2001 to 2005 her family lived with Doe's family in California. She testified in great detail about the size, layout, and occupancy of the Wildomar and Romoland mobile homes. She recalled her family had lived with Doe's family in Romoland and even before that, in Wildomar. She also remembered Escalante's nephew, Rodolfo, came to live with them around 2003. When the families moved to Romoland, Rodolfo's wife and daughter moved in and Yamaly's mother gave birth to Perla.

Yamaly said with all of these people living in the homes there was never an opportunity for Escalante to be alone with Doe. She testified, "There were always children running around the house, going into rooms without knocking, even in the restroom. So there was around, what, ten children at that point, and seven full adults. So no, the house was always, always full." According to Yamaly, she and Doe "were together all the time" and her mother and C. "were always home." She recalled Doe began acting differently a month before accusing Escalante of sexual abuse, and she believed the change in Doe's demeanor was a result of frequent visits with her maternal grandmother.

2. *Escalante's testimony*

Escalante denied ever touching Doe inappropriately. He believed C. and Doe's grandmother had encouraged her to fabricate allegations of sexual abuse against him. When asked why Doe would be willing to do so, Escalante recalled Doe would get upset when they went out to restaurants and he "would speak really nice" to the waitresses.

Escalante denied leaving the United States as a result of Doe's allegations. He said he had already been planning to leave C. by that time and it was a coincidence he left for Mexico on November 7, 2005, the same day Doe accused him of sexual abuse.

According to Escalante, on the morning of November 7, he went to a travel agency to buy a ticket to Mexico, but the agency was closed. When he returned home C. told him, "I know you're leaving . . . I prefer to see you in jail or dead before you leave." Later that day, after he spoke with the police at Doe's school, he went straight to his friend's ranch and spent the night. The next day he went to Tijuana, and from there flew to his mother's home in La Purisima Pinos Zacatecas. Escalante stayed in Mexico for the next several years despite the fact his friends and family lived in California. He eventually married a woman in Mexico and had two children.

Escalante said he first learned he had legal problems in the United States when he was stopped by immigration agents in Texas in May 2013. The agents gave him the choice of returning to Mexico or "fix[ing] the problem," and he chose to fix it.

C. *Escalante's Motion to Permit Foreign Witnesses to Testify by Video*

In April 2014, Escalante filed a pretrial motion to allow several of his relatives to testify in his defense by live video feed from Mexico. He listed seven relatives who would be able to testify about "the living arrangements, living conditions, schedules, sleeping arrangements, [and] expressed feelings and behavior of all the persons living in the [Wildomar and Romoland] homes." According to Escalante, this testimony would make clear "that at no time did [Doe] report any abuse to anyone living in the homes and at no time did she act strange around [Escalante]" and "there was virtually never a time when [Escalante] could have been alone with [Doe]." Escalante also argued "certain of these witnesses were told by [C.] that she wanted to 'get rid of [Escalante]' well before any allegations of abuse surfaced." The seven proposed witnesses were Yamaly, Jamie, Graciela, Rodolfo, Norma, Montserat (Rodolfo and Norma's daughter), and Perla (Jamie's youngest daughter, who was an infant when Doe disclosed the abuse in 2005).

The court held a hearing on the motion on September 29, 2014, about a week before trial. Defense counsel informed the court the seven listed relatives lived in Mexico and, with the exception of Yamaly, did not have visas to enter the United States. He proposed using the aid of an attorney based in Riverside County who is "licensed by the State Bar of California as a foreign legal consultant" to establish a video connection between the courtroom and a notary public's office in Mexico. Under this set up, counsel argued, both parties could examine the witnesses in front of the jury.

When asked for an offer of proof as to each relative's testimony, counsel stated he had interviewed them over the phone and "each witness would testify as to the living arrangements . . . how big the home was . . . the number of bedrooms, the sleeping arrangements, and the work schedules of the various people." The court asked counsel if he had a "specific" offer of proof for each relative so it could properly assess admissibility, and counsel replied, "it's what I've said before. I mean, each one had a slightly different schedule . . . We had a total of 10 kids and then these three families." "They all had different points of observation . . . In total, they would be covering an entire day, 24-hour period, over all these [five] years."

In response, the court stated, "So you say. Where is the documentation? Where is the investigative report? You are just saying I want you to let these witnesses testify over the computer . . . and be cross-examined without them being present in court, and I have the most minimal information as to why their testimony would be relevant . . . it would seem that the testimony of each would have to be absolutely of an extremely compelling nature to overcome the confrontation clause . . . which would seem to prohibit the taking of such testimony." Counsel explained he had not documented what each witness would testify about because he did not realize the court was "going to require that level of detail right now."

The court then asked counsel "[w]hat hoops [he] jumped through . . . to get [the relatives] here, other than to talk to them on the phone [and] accept their statements that they don't have a visa." Counsel replied he had "not taken any additional steps" in the

six months since he had filed the motion to help the relatives obtain permission to temporarily enter the United States for the purpose of testifying. Counsel admitted he had relied on the relatives' representations and had not determined whether they lacked visas because they had never applied for them or because they were denied them for deportation or other reasons. The court told counsel he was requesting "an extreme remedy to a situation that occurs day in and day out, both on the prosecution side and on the defense side." Counsel responded, "in this day and age, with the modern technology, people should be allowed to [testify remotely]" when they are unable to travel to the United States.

The court denied the motion on several grounds. It concluded video conferencing with witnesses located in another country would impede its authority to wield contempt power over the witnesses as well as the prosecution's ability to conduct effective cross-examination. It also concluded counsel's offer of proof was insufficient to demonstrate the relatives' testimony would be relevant and would not cause undue delay. (Evid. Code, § 352.) The court stated: "You are making the . . . vaguest reference that these people lived at the house and so they can testify to the schedule, and when they testify to the schedule, it will be clear, apparently, that there was not opportunity [to molest]. And, based on the limited record you are providing . . . I'm not viewing exactly that this is the most compelling persuasive evidence." Finally, the court found counsel had failed to demonstrate the proposed witnesses were unavailable because it was unclear why they lacked visas.

II

DISCUSSION

Escalante contends the court violated his Sixth Amendment right to compulsory process when it denied his motion to present the testimony of foreign witnesses by video. He further contends his counsel rendered ineffective assistance by failing to inform the court that the 1991 Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance provided him with the legal authority for presenting foreign witness testimony by video. (Mexico-United States: Mutual Legal Assistance Cooperation Treaty, Dec. 9, 1987, Sen. Treaty Doc. No. 100-13, eff. May 3, 1991, 27 I.L.M. 443 (Treaty).)[2]

As an initial matter, this appeal is not about the violation of Escalante's Sixth Amendment right to compulsory process. "A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf." (*In re Martin* (1987) 44 Cal.3d 1, 30.) Such misconduct on the part of the government occurs, for example, when a state agent "engage[s] in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify.'" (*Id.* at p. 31; see also *id.* at pp. 20, 35 [prosecution violated defendant's right to compulsory process when its investigator arrested a defense witness in the hallway of the courthouse as an accessory to murder immediately after the

[2] We granted Escalante's request to take judicial notice of the Treaty.

witness had finished testifying and "in the presence of prospective defense witnesses"].) Escalante cannot demonstrate any misconduct occurred in this case. The reason he was unable to make use of the court's subpoena power is because his potential witnesses lived outside the jurisdiction of the United States. (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1434 (*Sandoval*) ["the trial court had no power to compel [the Mexican citizen's] appearance in person in Sacramento County"].) Neither the court nor the prosecution played a role in the witnesses' inability to travel to the United States to testify on his behalf. The trial court simply made an evidentiary ruling not to allow testimony via video.

Escalante argues the constitutional violation lies in the court's failure to recognize the existence of the Treaty, which, according to him, supplies the legal authority for presenting foreign witness testimony by video. The Treaty does no such thing; it is a prosecutorial tool for the United States and Mexican governments "to combat a wide variety of modern criminals including members of drug cartels, 'white-collar criminals,' and terrorists." (Treaty, Letter of Transmittal from President Reagan to Senate, 27 I.L.M. at p. 445.) "Through the Treaty, the United States and Mexico have agreed to 'cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters. . . . Such assistance shall deal with the prevention, investigation and *prosecution* of crimes.'" (*Sandoval*, *supra*, 87 Cal.App.4th at p. 1440, quoting Treaty, art. 1, par. 1, 27 I.L.M. at p. 447, italics added.) Nothing in the Treaty invests authority in private parties like Escalante to gather

evidence. It states: "This Treaty is intended solely for mutual legal assistance between the Parties [who are defined as "The Governments of the United States of America and the United Mexican States"]. The provisions of this Treaty *shall not give rise to a right on the part of any private person* to obtain . . . any evidence. . . ." (Treaty, art. 1, par. 5, 27 I.L.M. at p. 448, italics added.)

We therefore conclude Escalante's reliance on the Treaty is misplaced because it does not authorize a criminal defendant to present foreign witness testimony by video. As a result, defense counsel did not render ineffective assistance by failing to cite the Treaty during the hearing on Escalante's motion.

In his reply brief, Escalante argues the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention")[3] authorized the court to allow foreign witness testimony by live video. While it is "axiomatic that arguments made for the first time in a reply brief will not be entertained" (*People v. Tully* (2012) 54 Cal.4th 952, 1075), this argument also fails on its merits. By its title and terms, the Hague Evidence Convention applies only to civil and commercial matters, and we are aware of no binding California authority holding it applies in criminal trials. (23 UST 2555, TIAS No. 7444, codified at 28 U.S.C. § 1781.)

[3] We granted Escalante's request to take judicial notice of the Hague Convention.

At its core, this appeal is a challenge to the court's exclusion of Escalante's relatives' testimony, which is an evidentiary ruling we review for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) An appellate court may not reverse a judgment based on erroneous exclusion of evidence "unless the 'substance, purpose, and relevance of the excluded evidence was made known to the court'" through an offer of proof. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001 (*Richardson*).) The offer of proof "must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Carlin* (2007) 150 Cal.App.4th 322, 334. (*Carlin*).) In *Carlin*, the appellate court held the trial court "properly rejected [the] appellant's offer of proof as inadequate" because the appellant had not "obtained a statement from [the proposed witness] in line with the proposed testimony," despite having access to an investigator and discovery procedures. (*Ibid.*)

Escalante argues his relatives would have testified about "the crowded living arrangements, and more importantly, of the marital strife" between him and C. He acknowledges Yamaly testified on both of these topics, but he argues the court's ruling deprived him of the opportunity to instead examine Yamaly's parents, Jamie and Graciela. He posits they may have clearer memories of 2001 through 2005 and therefore may have provided more credible testimony than their daughter.

First, this argument is belied by the actual testimony of Yamaly, who told the prosecutor she had no problem remembering the events of 2001 through 2005 and described in great detail her family members' living arrangements and work schedules, as well as Doe's behavior leading up to her disclosure of the abuse. The record therefore does not support a claim that Yamaly was too young to remember the relevant time period.

Second, Escalante cannot point to any testimony Jamie and Graciela would have provided that Yamaly did not provide. According to Escalante's offer of proof, his relatives would testify about "the living arrangements, living conditions, schedules, sleeping arrangements, [and] expressed feelings and behavior of all the persons living in the [Wildomar and Romoland] homes." As described in part I.B.1 above, Yamaly provided testimony on both topics. Without a more specific offer of proof as to what Jamie and Graciela would have said on the stand, Escalante cannot demonstrate the court erred in excluding their testimony as cumulative. (E.g., *Richardson*, *supra*, 43 Cal.4th at p. 1001 [trial court has broad discretion to exclude evidence that is cumulative or will "necessitate undue consumption of time"].)

More importantly, even if the court's ruling was erroneous, Escalante cannot demonstrate prejudice. "An abuse of discretion standard requires the reviewing court to uphold the exclusion of evidence unless the reviewing court finds the trial court acted arbitrarily, capriciously, or in a patently absurd manner *and* that the exclusion of the evidence resulted in a *manifest* miscarriage of justice." (*People v. Foss* (2007) 155

Cal.App.4th 113, 125, citing *People v. Ledesma* (2006) 39 Cal.4th 641, 705.) "'[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Richardson, supra,* 43 Cal.4th at p. 1001.)

The evidence of Escalante's guilt is overwhelming, and the jury believed Doe's version of events over his. Doe testified in compelling detail about the abuse she suffered in secret for years. She explained how Escalante would ensure they were alone in an otherwise crowded trailer by preying on her at night when her mother was at work and everyone else was asleep or during the day when the other children were playing outside. Escalante claimed Doe's entire story was fabricated and it was simply a coincidence he fled to Mexico as soon as she disclosed the abuse. Both Escalante and Yamaly testified he never had an opportunity to be alone with Doe and Doe was pressured to fabricate her allegations, but the jury did not believe this testimony. Instead, the jury believed the school counselor, Deputy Hamilton, and Doe herself, when they testified Doe was hesitant to disclose the abuse because she worried it would destroy her family. The jury also credited Doe's testimony Escalante would prey on her in private and concoct reasons to be alone with her. Given the jury's clear rejection of Escalante's theories of motive to lie and lack of opportunity, additional testimony on those topics from other members of his family would not have changed the outcome of trial.

III

DISPOSITION

We affirm the judgment.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

MILLER
J.